

STATE OF MICHIGAN  
IN THE SUPREME COURT  
(ON APPEAL FROM THE COURT OF APPEALS)

ASSOCIATED BUILDERS  
AND CONTRACTORS,

Plaintiff-Appellant,

v.

CITY OF LANSING,

Defendant-Appellee.

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Supreme Court No. 149622

Court of Appeals No. 313684

Lower Court No. 12-406-CZ

***AMICUS CURIAE* BRIEF OF  
MICHIGAN BUILDING AND CONSTRUCTION TRADES COUNCIL  
AND MICHIGAN STATE AFL-CIO  
IN SUPPORT OF DEFENDANT-APPELLEE CITY OF LANSING**

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## STATEMENT OF INTEREST OF AMICI CURIAE

The Michigan Building and Construction Trades Council (“Trades Council”) is an umbrella labor organization whose membership is comprised of numerous labor unions, as well as regional councils, representing building and construction trades workers in Michigan. The Trades Council has a fundamental interest in protecting and enhancing the work opportunities, wages, hours, benefits, and other terms and conditions of employment of the union building trades workers who seek to be employed on public works construction projects in Michigan that are covered by prevailing wage laws—including Lansing’s Prevailing Wage Ordinance (“Ordinance”).

The Trades Council was one of the primary organizations supporting passage of the Michigan Prevailing Wage Act, MCL 408.551 *et seq.* Since this Act was adopted in 1965, the Trades Council has been involved in virtually every Federal and Michigan appellate case in which the applicability of the Act was challenged.<sup>1</sup> The Trades Council has also been an intervening party in other similar cases where the validity of a city’s prevailing wage ordinance was at issue. See *Associated Builders and Contractors, Saginaw Valley Area Chapter v City of Bay City* (Bay County Circuit Court, Case No. 11-3243-CZ).

The Trades Council’s member unions are parties to collective bargaining agreements with building trades contractors, which generally require the payment of wages and benefits at or above prevailing wage levels. The Trades Council, its member unions and workers, and their union contractors have an interest in maintaining prevailing wage laws in order to create a level playing

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<sup>1</sup> See *Associated Builders & Contractors v Wilbur*, 472 Mich 117; 693 NW2d 374 (2005), on remand, *Associated Builders & Contractors v Dir, Dep’t of Consumer & Indus Servs*, 267 Mich App 386; 705 NW2d 509 (2005); *Michigan State Bldg & Constr Trades Council v Perry*, 241 Mich App 406; 616 NW2d 697 (2000); *Western Mich Univ Bd of Control v State*, 455 Mich 531; 565 NW2d 828 (1997).

field in bidding for public construction work. If Lansing's Ordinance is declared invalid, as Plaintiff-Appellant seeks, the contractors, unions and employees who are governed by these collective bargaining agreements would be placed at a competitive disadvantage. Specifically, in bidding on Lansing projects, union building trades contractors who are required by their collective bargaining agreements to pay prevailing wages and benefits, would be at a competitive disadvantage with contractors who are not required to pay prevailing wage and benefit rates.

Importantly, union building trades contractors invest heavily in certified apprenticeship and training programs through collectively bargained benefit contributions to these programs, and contractor payments to these programs are included among the fringe benefits that are used to calculate composite prevailing wage and fringe benefit rates. See *Michigan State Bldg & Constr Trades Council v Perry*, 241 Mich App 406, 414; 616 NW2d 697 (2000). As a result of this heavy investment in training by the unionized construction industry, union construction workers can command higher wages because of their high skill levels and productivity.

If the Ordinance is declared invalid, the result would be to depress wage and benefit levels paid to all construction workers on Lansing projects, and a "race to the bottom" in terms of construction wages and benefits. Instead of competing on the basis of quality and productivity, substandard contractors could compete on the basis of labor costs alone, thereby undercutting quality contractors (both union and nonunion) who pay their workers higher wages and benefits commensurate with their higher skill levels and higher productivity. Such a result would be directly contrary to the Trades Council's organizational purpose of maintaining and improving the wages, benefits and working conditions of Michigan construction workers.

The Michigan State AFL-CIO ("State AFL") is a labor federation comprised of constituent labor organizations in Michigan. Local unions affiliated with the State AFL

represent hundreds of thousands of employees in the public sector and private sector throughout Michigan. A primary objective of the State AFL is to improve the quality of life for working families in Michigan. In furtherance of this objective, the State AFL has sponsored, promoted and supported national, state and local legislation to improve wages, benefits and working conditions for workers, including local prevailing wage ordinances throughout Michigan.

Given their experience and long-term interest in the issues raised by this case, the amicus curiae brief submitted by the Trades Council and State AFL brings additional necessary perspective to the attention of the Court as the Court considers the merits of this appeal.

## **JURISDICTIONAL STATEMENT**

*Amici* Michigan Building and Construction Trades Council and Michigan State AFL-CIO incorporate by reference and rely upon the Jurisdictional Statement contained in Defendant-Appellee City of Lansing's brief.

## **COUNTER-STATEMENT OF THE QUESTIONS INVOLVED**

*Amici* Michigan Building and Construction Trades Council and Michigan State AFL-CIO incorporate by reference and rely upon the Counter-Statement of the Questions Involved contained in Defendant-Appellee City of Lansing's brief.

## INTRODUCTION

This case involves what should be an easy question: whether the City of Lansing, a Michigan home rule city, has authority under its general police powers, its authority to regulate trades and occupations, its authority with respect to its property and its authority to contract, pursuant to the Michigan Home Rule City Act and the Michigan Constitution of 1963, to enact an ordinance setting minimum prevailing wage rates for construction trade workers employed on city-owned and city-funded construction projects – a subject which is obviously a matter of local concern. Because under the 1963 Constitution cities enjoy broad police powers, coextensive with those of the state, to legislate for the public health and welfare, including the regulation of employment conditions of city employees as well as workers employed on city-owned and city-funded projects, unless expressly denied by the state, the answer is clearly “yes.” And because the holding to the contrary in *Attorney General ex rel Lennane v City of Detroit*, 225 Mich 631; 196 NW391 (1923) cannot be reconciled with the 1963 Constitution and this Court’s precedent both before and after 1963, *Lennane* should be formally overruled.

## **COUNTER-STATEMENT OF FACTS**

*Amici* Michigan Building and Construction Trades Council and Michigan State AFL-CIO incorporate by reference and rely upon the Counter-Statement of Facts contained in Defendant-Appellee City of Lansing's brief.

## **STANDARD OF REVIEW**

*Amici* Michigan Building and Construction Trades Council and Michigan State AFL-CIO incorporate by reference and rely upon the Standard of Review contained in Defendant-Appellee City of Lansing's brief.

## ARGUMENT

**Prevailing Wage Laws Such As Lansing's Ordinance Obviously Relate To Matters Of Local Concern And Are Therefore Within A Municipality's Home Rule Authority Under The Michigan Constitution And The Home Rule City Act. *Lennane's* Holding To The Contrary Was, And Is, Unsupportable, And Has Been Superseded By Subsequent Case Law And The 1963 Constitution. Accordingly, *Lennane* Should Be Formally Overruled.**

### A. The *Lennane* Decision

In *Attorney General ex rel Lennane v Detroit*, 225 Mich 631; 196 NW 391 (1923) the Court concluded that a Detroit ordinance which established minimum wage rates, maximum hours of work and overtime requirements for city employees; and required city contractors to pay prevailing wages to their employees working on city public works projects, was beyond the city's authority and *ultra vires* under the 1908 Michigan Constitution. In its analysis of this issue the Court framed the question as follows: "Without deciding, but assuming for the purposes of the case that the city may fix a public policy applicable to its matters of local and municipal concern, there is still left the question of the power of the city to declare a public policy applicable to matters of State concern." 225 Mich at 636. In deciding that the Detroit ordinance was *ultra vires*, the Court first concluded that cities did not possess any inherent police power under the Constitution, but that "[t]he police power rests with the State. *Id.*, 638. The Court explained, "[t]hat power has not been delegated to these agents of the State [and] [u]nless delegated in some effective way the police power remains in the State." *Id.*, 638. The Court found that cities had very limited police power, but that beyond those "narrow limits . . . the police power, like any other power conferred on a municipality, must be expressly delegated by the Constitution or legislature of the State." *Id.*, 639-640.

The Court invalidated the ordinance, concluding that the city had no power to enact it because in doing so the city had attempted to exercise police power over matters of State concern:

In the provisions under consideration the city has undertaken to exercise the police power not only over matters of municipal concern but also over matters of State concern. . . . If we assume, as we have for the purposes of the case, without deciding the question, that the city possesses such of the police power of the State as may be necessary to permit it to legislate upon matters of municipal concern, it does not follow that it possesses all the police power of the sovereign so as to enable it to legislate generally in fixing a public policy in matters of State concern. This power has not been given it either by the Constitution or the home-rule act.

225 Mich at 640-641.

Notably, the Court did not give any reason or explanation, nor cite any authority, to support its conclusion that the setting of wage rates for city employees, or prevailing wages for employees of city contractors on city public works projects, were matters of State concern over which the city could not intrude, even assuming that the city had authority to legislate over matters of local concern. The Court's conclusion cannot withstand any scrutiny. It was unsupportable then, and is unsupportable now. *Lennane* should be overruled.

It should be obvious that prevailing wage laws like the Detroit ordinance in *Lennane*, and the Lansing ordinance here, relate to matters of local concern. Both involve a city's policy judgment as to how to spend its own funds, under contracts for the improvement of its own property. If a city decides to spend its own money for higher quality materials on its own building, that is surely a matter of local concern. The same is true if a city decides to spend its own money to attract more highly skilled tradesmen and women to work on that building.

#### **B. The Lansing Ordinance Relates to Matters of Local, Municipal Concern**

Lansing's Prevailing Wage Ordinance ("Ordinance") requires that before the city approves or executes any "contract, agreement or other arrangement for construction on behalf of the City" that the contractors and subcontractors agree that workers "employed directly upon the site of the work" will be paid "at least the prevailing wages and fringe benefits for corresponding

classes of mechanics and laborers, as determined by statistics compiled by the United States Department of Labor and related to the Greater Lansing Area by such Department.” (Lansing Code of Ordinances, §206.18) The Ordinance further requires that all bid documents for City construction projects contain provisions requiring the payment of prevailing wages. *Id.* Accordingly, the Ordinance requires that contracts on covered city construction projects contain a provision that contractors must pay a minimum prevailing wage at rates established for the Greater Lansing area.

The Ordinance, therefore, attempts to insure that when the city is spending its own money on construction projects to develop, maintain or improve its own property, the tradesmen and women performing that work for the city are paid a prevailing wage commensurate with their skill level, according to the rates established by the U.S. Department of Labor. The Ordinance is limited to city projects funded by the city. It does not affect public sector construction outside the city; and it does not affect private sector construction inside or outside of the city. In short, the Ordinance regulates only public construction work performed on the city's *own property* funded with the city's *own money*.

The Ordinance is patterned after the Michigan Prevailing Wage Act, MCL 408.551 *et seq.*, which in turn is patterned after the federal Davis Bacon Act, 40 USC 3141 *et seq.* In *Western Michigan University v State of Michigan*, 455 Mich 531, 535; 565 NW2d 828 (1997), this Court explained the purpose of prevailing wage laws as follows:

[Prevailing wage laws] serve to protect employees of government contractors from substandard wages. Federal courts have explained the public policy underlying the federal act as “protecting local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area”. . . [and] “*giving local labor and the local contractor a fair opportunity to participate in this building program.*” [*Universities Research Ass’n, Inc v Coutu*, 450 US 754, 773-774; 101 S Ct 1451; 67 L Ed 2d 662 (1981)]. The purposes of the Davis-Bacon Act are to protect the employees of Government

contractors from substandard wages and to *promote the hiring of local labor* rather than cheap labor from distant sources. [*North Georgia Building & Construction Trades Council v Goldschmidt*, 621 F2d 697, 702 (CA 5, 1980)]. (emphasis supplied)

In *Universities Research Ass'n v. Coutu*, 450 US 754, 773-774; 101 S Ct 1451; 67 L Ed 2d 662 (1981), cited in *Western Michigan University, supra*, the U.S. Supreme Court referred to the Davis-Bacon Act's legislative history and the testimony of its cosponsor, Representative Robert L. Bacon (R-NY) to further explain the purposes of prevailing wage laws. As Representative Bacon testified:

I think that it is a fair proposition where the Government is building these post offices and public buildings throughout the country that *the local contractor and local labor may have a "fair break" in getting the contract. If the local contractor is successful in obtaining the bid, it means that local labor will be employed, because that local contractor is going to continue in business in that community after the work is done. If an outside contractor gets the contract, and there is no discrimination against the honest contractor, it means that he will have to pay the prevailing wages, just like the local contractor.*" 74 Cong. Rec. 6510 (1931).

*Id.*, n 25. (emphasis supplied)

Certainly, protecting employees working on city projects from substandard wages, and promoting the hiring of local contractors and local labor, are legitimate policy choices by the City of Lansing, and obviously matters of local concern. Moreover, the enactment of prevailing wage laws by municipalities reflects a policy choice based on additional perceived social and financial benefits to the local economy. Decades of experience with prevailing wage laws, and a preponderance of economic studies, provide ample proof of these additional benefits.

For example, a 2008 study, after reviewing and analyzing the existing research on the economic impact of prevailing wage laws, concluded that "a growing body of economic studies finds that prevailing wage regulations do not increase government contracting costs. . . . These studies also show that prevailing wage laws provide social benefits from higher wages and better

workplace safety, increase government revenues, and elevate worker skills in the construction industry.” Mahalia, Nooshin (2008), *Prevailing Wages and Government Contracting Costs: A Review of the Research*, Economic Policy Institute, at 1-2. (Attached as Ex. 1). Among the reasons why prevailing wage regulations do not increase public construction costs is that labor productivity is not static: higher wages lead to improved productivity, which offsets higher wages, by attracting better skilled, more efficient workers, and by increasing the utilization of labor-saving technologies. *Id.*, 2. Another reason is that labor costs are only a small portion of total construction costs, so that increased labor costs have only a minimal impact on total costs. *Id.* This study also noted that “recent studies . . . have found that prevailing wage laws can enhance state tax revenues, industry income, and non-wage benefits for workers; lower future maintenance and repair costs; reduce occupational injuries and fatalities; and increase the pool of skilled construction workers – to the benefit of both the public and the construction industry.” *Id.*, 3<sup>2</sup>

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<sup>2</sup> See also, Duncan, Kevin (2011), *An Analysis of Davis-Bacon Prevailing Wage Requirements: Evidence from Highway Resurfacing Projects in Colorado*, Healey Center for Business and Economic Research, Hagan School of Business, Colorado State University-Pueblo, at 4-5 (Attached as Ex. 2) (finding “no statistically significant difference between the costs of projects that do, and do not require the payment of prevailing wages;” that “productivity and the efficiency of construction is higher on projects that pay prevailing wage rates [so that] when construction worker wages rise on prevailing wage projects, productivity also increases in a way that stabilizes the total cost of the project; and that “[because] labor costs are a low percentage of total costs in the construction industry, productivity does not need to increase substantially to offset the effect of prevailing wage rates.”; Kelsay, Michael, James Sturgeon and Kelley Pinkham (2011), *The Adverse Impact from Repeal of the Prevailing Wage Law in Missouri*, Department of Economics, University of Missouri-Kansas City, at 9 (Attached as Ex. 3) (Concluding, *inter alia*, that “Missouri’s prevailing wage laws do not raise the cost of construction. Our examination of both the short and long-term effects of prevailing wage show positive and substantial impacts on construction workers, their families, other industry participants and their families, and state, county and local revenue streams.”); and Dickson Quesada, Alison, Frank Manzo IV, Dale Belman, and Robert Bruno (2013), *A Weakened State: The Economic and Social Impacts of Repeal of the Prevailing Wage Law in Illinois*, Labor Education Program, School of Labor and Employment Relations, University of Illinois at

The merits of the policy choice to require prevailing wages may be debatable, but there can be no debate that it is, in fact, a legitimate policy choice. In short, protecting employees of city contractors working on city projects from substandard wages, promoting the hiring of local labor and local contractors rather than cheap labor and substandard contractors from distant sources, encouraging the use of high quality contractors using highly skilled and productive workers, and creating social and economic benefits to the local economy, are inarguably matters of legitimate local concern and a proper exercise of a city's police power.

**C. The *Lennane* Holding is a Product of The *Lochner* Era and Cannot Withstand Scrutiny Under Modern Jurisprudence Governing Legislative and Municipal Power**

Nearly a century later, it is difficult to understand how the Court in *Lennane* could not have recognized that Detroit's prevailing wage law related to matters of local concern. But *Lennane* must be viewed in its historical context.

*Lennane* was decided at the height of the "*Lochner*" era, named after the United States Supreme Court's infamous decision in *Lochner v New York*, 198 US 45; 25 S Ct 539; 49 L Ed 937 (1905), declaring that compulsory minimum wage laws were unconstitutional. *Lochner* was the product of a long-discredited judicial philosophy in which courts struck down what they viewed as imprudent economic regulation under the guise of "due process." The prevailing judicial philosophy during this era was one of deep hostility and strict scrutiny of economic regulation in general, and of laws that sought to regulate working conditions in particular.

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Urbana-Champaign, at i (attached as Ex. 4) (concluding, *inter alia*, that prevailing wage laws do not increase public construction costs; that repeal would result in statewide job losses, decreased GDP, lost tax revenue, and additional workplace fatalities; and that prevailing wage laws encourage apprentice training in the construction industry).

For three decades following *Lochner*, the nation's courts consistently invalidated compulsory minimum wage laws. See, e.g., *Morehead v New York ex rel Tiplado*, 298 US 587; 56 S Ct 918; 80 L Ed 1347 (1936) (invalidating New York State law); *ALA Schechter Poultry Corporation v United States*, 295 US 495; 55 S Ct 837; 79 L Ed 1570 (1935) (invalidating a federal statute); *Donham v West-Nelson Mfg Co*, 273 US 657; 47 S Ct 343; 71 L Ed 825 (1927) (invalidating Arkansas statute); *Connally v General Const Co*, 269 US 385; 46 S Ct 126; 70 L Ed 322 (1926) (invalidating Oklahoma prevailing wage law); *Murphy v Sardell*, 269 US 530; 46 S Ct 22; 70 L Ed 396 (1925) (invalidating Arizona statute); *Adkins v Children's Hospital*, 261 US 525; 43 S Ct 394; 67 L Ed 785 (1923) (invalidating District of Columbia minimum wage law); *Folding Furniture Works v Industrial Commission of Wisconsin*, 300 F 991 (WD Wis 1924) (invalidating Wisconsin statute); *Topeka Laundry Co v Court of Industrial Relations*, 119 Kan 12; 237 P 1041 (Kan. 1925) (invalidating Kansas statute).

The *Lochner* era, of course, is long gone. See *Ferguson v Skrupa*, 372 US 726, 730; 83 S Ct 1028; 10 L Ed 2d 93 (1963) ("The doctrine that prevailed in *Lochner* . . . , and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded.")

In short, the wisdom of prevailing wage legislation, including the Lansing ordinance, is for the legislative branch – not the courts – to judge. As Justice Taylor wrote in upholding legislation enacting damage caps:

What these courts [upholding laws limiting liability] have been unwilling to do is to usher in a new *Lochner* era. It was during that era when, for a time after the industrial expansion of the United States began in the mid-nineteenth century and, on the basis of strained constitutional interpretation, the United States Supreme Court threw out economic regulations that had been won in the political process. The central theme of the *Lochner* jurisprudence was, as Justice Peckham wrote of the ill-fated New York state effort to regulate the hours of bakers, "Are we all . . . at the mercy of legislative majorities?" *Id.* At 59.

He and a majority of the Court concluded, “No.” Yet, by the mid-1930s, in *Nebbia v New York*, 291 U.S. 502, 537; 54 S Ct 505; 78 L Ed 940 Z(1934), Justice Owen Roberts’s majority opinion for the Court stated that “a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare . . . . With the wisdom of the policy adopted, . . the courts are both incompetent and unauthorized to deal.” From that time, economic regulation, such as the measure we deal with today, has consistently been held to be an issue for the political process, not for the courts. Along with the noted jurisdictions, we are unwilling to turn our backs on this law. It is into this mainstream that we again steer our economic regulation jurisprudence.

*Phillips v Mirac, Inc.*, 470 Mich 415, 437-438; 685 NW 2d 174 (2004):

**D. *Lennane* Has Been Superseded by Subsequent Case Law, Even Before the 1963 Constitution**

As explained below, changes in the 1963 Constitution expanded the scope of cities’ police power and expressly recognized that cities possess all powers not expressly denied. Accordingly, the 1963 Constitution has rendered obsolete and superseded *Lennane*, whose fundamental premise was that cities possess only those powers expressly and unmistakably granted. However, even before the 1963 Constitution, *Lennane* had been superseded and implicitly overruled by subsequent case law.

Well before 1963, Michigan courts recognized that broad police powers, including the ability to regulate wages, hours, and conditions of employment for city workers, had been delegated to Michigan’s cities. In *People v Sell*, the Michigan Supreme Court held:

[T]he police power of Detroit is of the same general scope and nature as that of the state. Therefore, authorities relating to the police power of the State are equally applicable in relation to the police power of the city.

*People v Sell*, 310 Mich 305, 315; 17 NW2d 193 (1945) (emphasis added). See also *People v Litvin*, 312 Mich 57, 62; 19 NW2d 485 (1945)

*Olson v. Highland Park*, 312 Mich 688; 20 NW2d 773 (1945) is particularly instructive. There, Highland Park’s charter required overtime pay for employees of the city. *Id* at 692. The defendant argued that the power to regulate workers’ wages, hours, and other working

conditions was reserved to the state legislature. *Id* at 695. The Court, however, ruled that where not otherwise in conflict with state law, municipalities had the power to regulate workers' wages, hours and working conditions:

The city contends that, because article V, §29 of the Michigan Constitution commits to the Legislature power to enact laws relative to hours and conditions under which men, women and children may be employed, a charter amendment on this subject, inconsistent with the State law, is void. We find no conflict between the statutes on the subject and the provisions of the charter; and in the absence of such conflict, there is no legal inhibition preventing the people of a municipality from speaking on that subject by their vote on an amendment to their charter when such amendment is not contrary to State Law. (citations omitted)

*Id.*

The charter provision challenged (and upheld) in *Olson*, which established a “service day” of eight hours and a “service week” of five days, *id.*, was virtually identical to portions of the Detroit ordinance struck down in *Lennane*, which established a service day of eight hours and a service week of six days. 225 Mich at 633. *Lennane* cannot be reconciled with *Olson*. See also, *Brimmer v Village of Elk Rapids*, 365 Mich 6, 13; 112 NW2d 222 (1961) (“In upholding the salaries paid, this Court was, of course, treating with *a matter of purely local character*”) (emphasis supplied) citing *Gildersleeve v Lamont*, 331 Mich 8; 49 NW2d 36 (1951); and *Kane v Flint*, 342 Mich 74, 77-78; 69 NW2d 156 (1955) (municipal police power includes power to fix compensation of city employees).

Michigan law has long defined the scope of police powers broadly. In *People v Sell*, the court defined the scope of municipal police power as follows:

The police power is said to be a ... a system of regulations tending to the health, order, convenience and comfort of the people and to the prevention and punishment of injuries and offenses to the public . . . It has for its object the *improvement of social and economic conditions* affecting the community at large and collectively with a view to bring about the greatest good of the greatest number. Courts have consistently and wisely declined to set any fixed limitations upon subjects calling for the exercise of this power. It is elastic and is exercised from time to time as varying social conditions demand correction.

310 Mich at 308-309 (citations and internal quotation marks omitted, emphasis added).

This Court has consistently found broad areas of commercial activity to be subject to police power regulation. For example, in *Cady v Detroit*, the court found municipal police power to permit such regulation, explaining:

Ordinances having for their purpose regulated municipal development, the security of home life, the preservation of a favorable environment in which to rear children, the protection of morals and health, *the safeguarding of the economic structure upon which the public good depends.*

289 Mich 499, 514; 286 NW 805 (1939) (emphasis added). See also, *People v Murphy*, 364 Mich 363; 110 NW2d 805 (1961); *Patchak v Lansing Tp*, 361 Mich 489, 105 NW2d 406 (1960)

The terms “public peace, health and safety” are not limited to protection from physical harm. “The police power relates not merely to the public health and public safety but, also, to public financial safety. Laws may be passed within the police power to protect the public from financial loss.” *People v Murphy*, 364 Mich at 368 (internal citations omitted)

In short, even before the 1963 Constitution, *Lennane’s* reasoning had been rejected by subsequent case law. Although never formally overruled, it had been superceded and was no longer valid as a source of authoritative precedent.

**E. The Michigan Constitution of 1963 Substantively and Fundamentally Changed the Law as to the Scope of a City’s Police Power Under the Home Rule Cities Act. The Lansing Ordinance was Properly Enacted Pursuant to the City’s Authority Under Art 7, §22 and Art 7, §34 of the 1963 Constitution, and Sections 3(j), 4i(d), 4i(j) and 4(j) 3 of the Home Rule City Act**

In 1963 Michigan adopted a new Constitution, replacing the previous constitution of 1908. With respect to the home rule authority of cities, the new Constitution reflected a reversal of the view which had prevailed in the early 20th century. Instead of the archaic, common-law rule under which cities possessed only those powers that were explicitly and

directly delegated, the 1963 Constitution embodied the modern view that home rule cities now enjoy all powers not expressly denied, rather than those specifically granted. In short, the relationship between the state and home rule municipal governments in Michigan “has matured to one of general grants of rights and powers, subject only to certain enumerated restrictions instead of the earlier method of granting enumerated rights and powers definitely specified.” *Detroit v Walker*, 445 Mich 682, 690; 520 NW2d 135 (1994).

Unlike the Constitution of 1908, the Michigan Constitution of 1963 included new wording and a new section expressly stating how constitutional and statutory provisions concerning local government must be interpreted. New language in Article 7, §22 provides that the specific grant of powers does not limit the general grant of powers to cities, and that these general powers extend to “*property and government*” as well as “municipal concerns.” This language *was not* present in the 1908 Constitution. The relevant section currently reads:

Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, *property and government*, subject to the constitution and law. *No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.* (New language italicized).

Similarly, Article 7, §34 mandates that the Constitution and Home Rule City Act be liberally construed to empower rather than restrict the actions of local government. This section also did not exist in the 1908 Constitution. It reads in pertinent part:

The provisions of this *constitution and law* concerning counties, townships, cities and villages *shall be liberally construed* in their favor. (emphasis added).

The drafters of the present Constitution understood that by adding the foregoing provisions they were memorializing a broadened and evolved concept of home rule powers. The official comment concerning Const 1963, Article 7, §34 stated in part:

This is a new section intended to direct the courts to give a liberal or broad construction to statutes and constitutional provisions concerning all local governments.

*Official Record of the Constitutional Convention of 1961 ("Record")*, v II, p 3395. The official comment explained the revisions to Article 7, §22 as reflecting "Michigan's successful experience with home rule. The new language is a more positive statement of municipal powers, ***giving home rule cities and villages full power over their own property and government***, subject to this constitution and law." (*Id* at 3393) (emphasis supplied)

The Convention Record further shows that the drafters were concerned with overly restrictive judicial interpretations of home rule powers under the prior constitution. Their solution was to clarify that local governments are granted broad home rule power absent specific limitation by the Legislature, rather than having home rule power dependent on an express legislative grant. The drafting committee explained the changes made to what became article 7, §22 as follows:

In addition, home rule cities and villages are guaranteed full power over *their own property* and government, and these powers cannot be limited except by deliberate statement of intent by the legislature.

(*Record*, v 1, p 1007, revised statement) (emphasis supplied).

There is no question that the Constitution of 1963 represents a sea change in the state's law regarding home rule. Michigan courts now reject the early 20<sup>th</sup> Century rule of "strict construction" of the Constitution and Home Rule City Act's provisions regarding the delegation of police power, which has been supplanted and overruled by the 1963 Constitution. As the Court explained in *Square Lake Hills Condominium Ass'n v Bloomfield Twp*, 437 Mich 310, 319; 471 NW2d 321 (1991):

At common law, we narrowly construed township ordinances enacted pursuant to the delegated police power in the township ordinance act. The delegates to the

1961 Michigan Constitutional Convention replaced the common-law rule of strict construction by constitutionally requiring courts to liberally construe all legislative and constitutional powers conferred upon townships. Const 1963, art 7, §34; see also, 1 Official Record, Constitutional Convention 1961, pp 1048-1058.

Michigan courts have consistently held that Article 7, §22 of the 1963 Constitution grants broad police powers to home rule cities delegating “not only those powers specifically granted, but . . . also . . . all powers not expressly denied.” *AFSCME v Detroit*, 468 Mich 388, 410; 662 NW2d 695 (2003) (citing *Detroit v Walker*, 445 Mich 682, 690; 520 NW2d 135 (1994)). See also *Rental Property Owners Ass’n of Kent County v Grand Rapids*, 455 Mich 246, 253-254; 566 NW2d 514 (1997); *Detroit Firefighters Ass’n v Detroit*, 449 Mich 629, 669; 537 NW2d 436 (1995); *Detroit v Walker*, 445 Mich at 690; *City of Monroe v Jones*, 259 Mich App 443, 452; 674 NW2d 703 (2003); and *Adams Outdoor Advertising Inc v City of Holland*, 234 Mich App 681, 687; 600 NW2d 339 (1999), *aff’d* 463 Mich 675; 625 NW2d 377 (2001).

In addition to the general powers granted pursuant to Const 1963 art 7, §22 and art 7, §34, the Home Rule City Act specifically delegates general police powers to Michigan’s cities. The Home Rule City Act requires mandatory city charter provisions that provide for:

Sec 3(j) ***The public peace and health and for the safety of persons and property.***  
In providing for the public peace, health and safety, a city may ***expend funds or enter into contracts*** with a private organization, the federal or state government, a county, village or township, or another city for services considered necessary by the legislative body. MCL 117.3(j) (emphasis added)

The Home Rule City Act also states that each city charter may provide for:

Sec 4i(d) The regulation of trades, occupations, and amusements within city boundaries, if the regulations are not inconsistent with state or federal law . . . .  
MCL 117.4i(d)

\* \* \*

Sec 4i(j) The enforcement of police, sanitary, and other ordinances that are not in conflict with the general laws. MCL 117.4i(j)

\* \* \*

Sec 4j(3) [T]he exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state. MCL 117.4j(3)

Michigan appellate courts now routinely find that the Home Rule Cities Act at §117.3 and 117.4i also delegates broad police power to Michigan cities. See, e.g., *Rental Property Owners Ass'n of Kent County v Grand Rapids*, 455 Mich at 254-255; *People v Krezen*, 427 Mich 681, 694; 397 NW2d 803 (1986). In *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 480-481; 666 NW2d 271 (2003), the court cited Const 1963 art 7, §22 and §117.3 of the Home Rule Cities Act in support of its finding that:

Among the powers that may properly be exercised by a home rule city is the police power. Except where limited by constitution or statute, ***"the police power of Detroit as a home rule city is of the same general scope and nature as that of the state."*** The state, pursuant to its inherent police power, may enact regulations to promote the public health, safety, and welfare. Thus, it is clear that defendant had the authority to enact the operations order for the public health, safety, and welfare of its citizens. (citations omitted and emphasis added).

Michigan Courts have also cited MCL 117.4i(j) in finding that the state's police powers have been delegated to Michigan's cities. See *People v Krezen*, 427 Mich at 694; and *Belle Isle Grill Corp v Detroit*, 256 Mich App at 480-481.

Current court decisions thus find municipal police power is limited only when in direct conflict with provisions of the state Constitution or when preempted by state statutes. In *Gora v City of Ferndale*, the Supreme Court recognized that ordinances passed pursuant to broadly conceived municipal police powers are valid "as long as [the] ordinance does not conflict with [the] constitution or general laws." 456 Mich 704, 711; 576 NW2d 141 (1998). See also *Rental Property Owners Ass'n of Kent County v Grand Rapids*, 455 Mich at 253. As the Court of

Appeals properly held, the Lansing Ordinance is not preempted, 305 Mich App at 413-419, and Plaintiff-Appellant ABC does not claim preemption. The Lansing ordinance was properly enacted pursuant to the city's police power under the Michigan Constitution and the Home Rule City Act.

### CONCLUSION

For the reasons stated herein and in Defendant-Appellee City of Lansing's Brief, this Court should affirm the Court of Appeals' decision upholding the Lansing Prevailing Wage Ordinance, and formally overrule *Attorney General ex rel Lennane v City of Detroit*.

Respectfully Submitted,

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Dated: March 31, 2015

STATE OF MICHIGAN  
IN THE SUPREME COURT  
(ON APPEAL FROM THE COURT OF APPEALS)

ASSOCIATED BUILDERS  
AND CONTRACTORS,

Plaintiff-Appellant,

Supreme Court No. 149622

Court of Appeals No. 313684

Lower Court No. 12-406-CZ

v.

CITY OF LANSING,

Defendant-Appellee.

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**CERTIFICATE OF SERVICE**

John R. Canzano, in the firm McKnight, McClow, Canzano, Smith & Radtke, P.C. being first duly sworn, deposes and says that on the 31<sup>st</sup> day of March, 2015 he electronically filed the foregoing paper with the Michigan Supreme Court using the Court's electronic filing system which will serve it on all parties of record registered for filing.

Dated: March 31, 2015

Respectfully Submitted,

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